Supreme Court, U.S.
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No. 04-886

In the Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL.
WILLIAM Q. TINGLEY AND WILLIAM Q. TINGLEY III,
Petitioners,

v.

900 MONROE L.L.C., 940 MONROE L.L.C., PIONEER INC., DYKEMA EXCAVATORS INC., FIFTH THIRD BANKCORP, SUPERIOR ENVIRONMENTAL CORP., PREIN & NEWHOF INC., DICKINSON WRIGHT P.L.L.C., FRANK D. MARSHALL, WILLIAM J. FISHER III, JOHN H. LOGIE, AND THOMAS E. BECKERING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns two separate but related matters. The first are violations of CERCLA[1] and the Solid Waste Disposal Act[2] during the redevelopment of an old furniture factory in downtown Grand Rapids, Michigan. The second is the concealment from the U.S. Government, in violation of the False Claims Act[3], of the present obligation to pay Superfund arising from the violations of CERCLA. The petitioners Tingley and Tingley III *in pro per* filed this case as a *qui tam* action on behalf of the government. The district court dismissed the Tingleys' complaint on the grounds that they had no standing to bring a *qui tam* without representation by an attorney. The district court then levied sanctions against the Tingleys on the basis that they should have known this as a matter of law. (The district court offered no explanation for its dismissal of the Tingleys' CERCLA and Solid Waste Disposal Act claims.) The Sixth Circuit upheld the district court without further analysis. The following questions are presented:

1. Did the Sixth Circuit err in affirming, in conflict with Ninth Circuit Court's decision in *United States ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert denied*, 510 U.S. 1140 (1994), that the Tingleys had no standing to bring a FCA claim on behalf of the U.S. Government unless represented by an attorney?

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[1] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Sections 9601 *et seq.*

[2] 42 U.S.C. Sections 6901 *et seq.*

[3] 31 U.S.C. Sections 3729 *et seq.*

2. In the alternative, did the Sixth Circuit err in affirming the district court's dismissal with prejudice of the Tingleys' FCA claim without first providing them notice of the requirement to be represented by an attorney?

3. With a split in district court decisions and no clear appellate authority resolving the question of whether *pro se* relators can bring a FCA claim, did the Sixth Circuit err in affirming, in conflict with this court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), the district court's extraordinary award of sanctions against the Tingleys under 31 U.S.C. Section 3730(d)(4)?

4. Did the Sixth Circuit err in affirming, in conflict with this court's decisions in *Bennett v. Spear*, 520 U.S. 154 (1997) and *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), the dismissal of Tingleys' CERCLA and Solid Waste Disposal Act claims on the grounds of lack of standing?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioners William Tingley and William Tingley III were the plaintiff-appellants below and are individuals. The Respondents were all defendant-appellees below.

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INTRODUCTION

In September 2000 Petitioners Tingley and Tingley III discovered that 940 Monroe L.L.C., a development company owned and controlled by Fifth Third, was removing, via their property, hazardous waste from the site of an old furniture factory in downtown Grand Rapids, Michigan, and dumping it at a nearby defunct municipal water treatment plant. The Tingleys immediately reported this activity to local, state, and federal authorities. However, 940 Monroe, its contractors Pioneer and Dykema Excavators, and their agents successfully obstructed and deterred the inquiries of these authorities by means of false affidavits and fraudulent soil testing.

Subsequently, in May 2002 the Tingleys *in pro per* filed under seal a False Claims Act complaint against the respondents because their removal of hazardous waste violated CERCLA and thus created under the statute a present obligation to pay Superfund, which they concealed from the U.S. government by means of false statements – namely false affidavits and soil tests submitted to government investigators. In June 2002 the Tingleys amended their complaint, while still under seal to include citizen suit claims under CERCLA and the Solid Waste Disposal Act. In October 2002 the U.S. Government declined to intervene in the FCA action, and the Tingleys' complaint was unsealed and served upon the respondents. The district court dismissed the Tingleys' complaint in June 2003 and awarded sanctions to the respondents in October 2003. The Sixth Circuit affirmed the district court decisions in September 2004.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. See *U.S. ex rel. Tingley v. 900 Monroe et al.*, Case Nos. 03-1889 and 03-2312 (6th Cir. Sept. 3, 2004) [Appendix B]. Its denial of the petitioners' motion for rehearing is also unreported. See *U.S. ex rel. Tingley v. 900 Monroe et al.*, Docket Nos. 03-1889 and 03-2312 (6th Cir. Sept. 27, 2004) [Appendix A]. The district court's final judgment and the award of sanctions are both unreported. See *U.S. ex rel. Tingley v. 900 Monroe et al.*, Case No. 1:02-CV-00319 (W.D. Mich. June 13, 2003) [Appendices E and F] and (W.D. Mich. Oct. 3, 2003) [Appendices C and D], respectively.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment in this case on September 3, 2004. [See Appendix B.] The Court of Appeals denied the Tingleys' petition for rehearing on September 27, 2004. [See Appendix A.] This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

William Tingley and his son William Tingley III brought the underlying action alleging: [1] The development companies 900 and 940 Monroe L.L.C., their contractors Pioneer and Dykema Excavators, and their agents violated CERCLA and the Solid Waste Disposal Act by releasing into the environment 27,000 tons of hazardous waste, in the form of contaminated soil excavated from the Berkey & Gay project site; and [2] the respondents, in violation of the False Claims Act, conspired to conceal these releases of hazardous

waste from the U.S. Government because they created a present obligation to pay Superfund, pursuant to the statutory language of CERCLA. The Tingleys' action sought monetary damages and injunctive relief.

A. FACTS

1. Releases of hazardous substances.

The Tingley family owns and operates a manufacturing plant next-door to an old furniture factory, the Berkey & Gay Building, in downtown Grand Rapids, Michigan. From November 1999 through March 2001, 940 Monroe L.L.C., a development company owned by Fifth Third and other parties related to the respondents, renovated the Berkey & Gay Building and surrounding parcels for commercial and residential use. Key to this redevelopment was a corridor under the Tingleys' control that served as the driveway to their manufacturing plant.

Once construction activities were underway, Pioneer, the lead contractor for the Berkey & Gay project, seized control of the corridor, after which Pioneer and Dykema Excavators used it to expedite the removal of hazardous waste, in the form of contaminated soil they had excavated from the project site, to a nearby defunct municipal water filtration plant. They then dumped the waste into the filtration plant's empty concrete water tanks. During the planning of the Berkey & Gay project Logie, as mayor of Grand Rapids, arranged for the land-contract sale of the City-owned filtration plant to Dykema Excavators. During the course of the Berkey & Gay project, Pioneer and Dykema Excavators dumped about 20,000 tons of contaminated soil at the filtration plant and another 6,000-7,000 tons at other locations. This soil removal activity was continuously recorded on videotape by

the surveillance cameras attached to the Tingleys' manufacturing plant and confirmed by analysis of the soil testing conducted by the Michigan Department of Environmental Quality ("MDEQ").

All of the soil of the Berkey & Gay project site was contaminated with toxic concentrations of two dozen chemicals and metals according to tests commissioned by Pioneer and Fifth Third and publicly recorded with the MDEQ. Pioneer and Dykema Excavators maintained no controls over their excavation, stockpiling, transport, and disposal of the Berkey & Gay's contaminated soil. Their uncontrolled soil removal activities resulted in thousands of releases of hazardous substances both into the environment and into contact with the Tingleys and their business and personal property.

2. Concealment of the releases.

Once the Tingleys became fully aware of this activity, they reported it to the MDEQ in September 2000 and later to the U.S. Environmental Protection Agency ("USEPA") and the City of Grand Rapids in October 2000. The USEPA directed the MDEQ to investigate the soil removal activities at the Berkey & Gay site for violations of environmental law. Under this mandate the MDEQ began making inquiries of 940 Monroe, Pioneer, Dykema Excavators, and their agents in November 2000.

The respondents cooperated in deterring the MDEQ's investigation by preparing a false account of the soil removed from the Berkey & Gay project site to conceal their massive releases of waste into the environment. They substantiated this account with false affidavits from the site's workers and fake soil tests. Then they produced a report containing the

false account and evidence and submitted it to the MDEQ in January 2001.[4] On the basis of the report alone, the MDEQ exonerated 940 Monroe, Pioneer, and Dykema Excavators of any wrongdoing.

The Michigan Attorney General's office recognized the inadequacy of the MDEQ's initial investigation and therefore, in February 2001 directed the MDEQ to re-open the case with a criminal investigator. The MDEQ did so but the criminal investigator inexplicably excluded from the MDEQ's investigation the very evidence – i.e., surveillance videotape of the soil removal activity, photographs of the project site, and an admission from one of the affiants that his affidavit contained false statements – that exposed the affidavits and soil tests as fraudulent. Additionally, the MDEQ's criminal investigator refused to test the filtration plant's new fill for signs of contamination from the Berkey & Gay site. Consequently, in March 2002 the MDEQ's criminal investigator again exonerated 940 Monroe, Pioneer, and Dykema Excavators because of a lack of evidence!

Meanwhile, the Tingleys attempted to obtain information about the offsite dumping of the Berkey & Gay's hazardous waste from the City of Grand Rapids In March 2001 and again in May 2001, Tingley III learned from a Grand Rapids City Commissioner that Logie, in his capacity as mayor, had twice made false statements to the City Commission to deter it from investigating the dumping of Berkey & Gay hazardous waste at the filtration plant. In June 2001, the Tingleys filed

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[4] On July 28, 2004, Respondent Superior Environmental filed a pleading with the Kent County Circuit Court in which it disavowed the validity of this report, which Superior had been instrumental in preparing.

a request with Logie to disclose the minutes of these meetings and other public records under Michigan's Freedom of Information Act, 1976 P.A. 442. Logie refused to disclose the minutes, and the Tingleys filed a FOIA lawsuit against the City in January 2002. To prevent the disclosure of the minutes, the City Attorney's office destroyed them by May 2002.

B. PROCEEDINGS BELOW

In reaction to the respondents' obstruction of the MDEQ's investigation (as directed by the USEPA) and the Grand Rapids City Commision's inquiries, which would have supplemented that investigation, on March 6, 2002, the Tingleys sent the U.S. Justice Department a copy of the False Claims Act complaint they intended to file in U.S. District Court. The Tingleys alleged how each of the respondents acted to conceal from the U.S. government the present obligation to pay Superfund pursuant to the statutory language of CERCLA which assigns an immediate and unadjudicated liability for releases of hazardous substances into the environment. At the same time, the Tingleys also served notice of intent to sue the respondents in U.S. District Court for violations of CERCLA and the Solid Waste Disposal Act arising from their releases of contaminated soil from the Berkey & Gay project site during its renovation and their ongoing use of the filtration plant as an illegal dump for that contaminated soil.

1. The District Court.

On May 8, 2002, the Tingleys *in pro per* filed under seal their FCA complaint in the U.S. District Court for the Western District of Michigan on behalf of a non-profit organization they operated, the Local Area Watch. On June

20, 2002, the Tingleys *in pro per* motioned the court to allow them to amend their complaint to: [1] Replace the Local Area Watch with themselves personally as the relators in the case; and [2] add a citizen suit count under both CERCLA and the Solid Waste Disposal Act. The court permitted the amendment.

On October 7, 2002, the U.S. Justice Department declined to intervene in the FCA counts of the amended complaint. Therefore, it was unsealed and served upon the respondents. The respondents replied to the complaint primarily by charging in motions for summary judgment that the Tingleys' complaint was nothing but a rehash of a failed lawsuits that they had filed in Michigan state court. Such a characterization was patently false, because the Tingleys prevailed or substantially prevailed in each of the lawsuits the respondents' had conflated into a alleged pattern of abusive litigation.[5] Then on February 6, 2003, the chief judge of the

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[5] The respondents alleged that the following state court cases associated with the Tingleys constituted a pattern of abusive litigation:

1. *Proto-CAM v. 940 Monroe*, Kent County Circuit Case No. 00-08231-CZ. The Tingleys' manufacturing company was the plaintiff. This was a trespass lawsuit, which the Tingleys won the case in trial court on July 16, 2003. The defendants appealed. The Michigan Court of Appeals affirmed the trial court on December 16, 2004.

2. *Local Area Watch v. Grand Rapids*, Kent County Circuit Case No. 02-00218-CZ. The Tingleys' non-profit organization was the plaintiff. This was a FOIA complaint which caused the City to disclose dozens of

district court dismissed the presiding judge and took over this case. The respondents took this opportunity, under the pretext of filing memoranda concerning the need for a Rule 16 conference, to inflame the chief judge against the Tingleys

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additional records. However, the trial court upheld the City's destruction of the City Commission minutes on August 16, 2002. The Tingleys appealed. The Michigan Court of Appeals affirmed the trial court on May 20, 2004, while noting the plaintiffs did partly prevail in this action. The matter is currently pending before the Michigan Supreme Court.

3. *Tingley v. 900 Monroe*, Kent County Circuit Court Case No. 02-03723-NZ. The Tingleys brought this suit against the parties who had conspired to use the filtration plant and other locations as unlicensed hazardous waste facilities in violation of Michigan law. The trial court dismissed the case on July 19, 2002, and the Tingleys appealed. The Michigan Court of Appeals reversed the trial court on June 24, 2004. The matter has been remanded to the trial court.

4. *Tingley v. Kortz*, Kent County Circuit Case No. 02-09503-CE. Tingley III filed this suit for ongoing violations of Michigan's Hazardous Waste Management Act. The trial court dismissed the case on November 15, 2002, and Tingley III appealed. The Michigan Court of Appeals reversed the trial court on June 24, 2004. The matter has been remanded to the trial court where it is pending consolidation with *Tingley v. 900 Monroe*.

Contrary to both the respondents' and the district court's characterization of these cases, the record shows that either the Tingleys have prevailed (completely or otherwise) or that the cases are meritoriously proceeding.

with false, misleading, and irrelevant statements about the Tingleys and their conduct.

Then without any further hearing in this matter, the chief judge dismissed the Tingleys' complaint in its entirety on June 13, 2003, [see Appendices E and F] and ordered under 31 U.S.C. Section 3730(d)(4) an extraordinary award of sanctions against the Tingleys on October 2, 2003 [see Appendices C and D]. Even though the district court had never given the Tingleys any notice during a year of litigation that they did not have standing to bring and maintain their FCA claims unless represented by an attorney, this was the district court's sole rationale for dismissing the Tingleys' complaint and sanctioning them. To emphasize its finding of bad faith on the part of the Tingleys, the district court uncritically accepted as true the extraneous matter of the discredited history of abusive litigation that the respondents had cobbled together from the Tingleys' disparate actions in state court. [See Appendix D.]

By restricting the basis for dismissal and sanctions to the issue of standing, the district court did not address in its opinion supporting final judgment the legal and factual merits of the Tingleys' claims. However, it is clear that the district court was grossly mistaken about a key fact of the case, which prejudiced it against the Tingleys. In a separate matter, the district court stated its belief that there existed exculpatory scientific testing conducted by the MDEQ on Berkey & Gay material that Pioneer and Dykema Excavators had dumped offsite. [See Appendix F.] In fact the soil test the court had in mind was of a dirt pile that the MDEQ had earlier determined came from a flower garden with no connection to the Berkey & Gay project site. After the dismissal of this case by the district court, on February 2, 2004, the MDEQ under the instructions of the Michigan Attorney General's

office did finally conduct tests of the material Pioneer and Dykema Excavators had dumped at the filtration plant. Expert analysis of these test results confirms that the source of that material was the Berkey & Gay project site, as the Tingleys had alleged.

2. The Court of Appeals.

The Tingleys *in pro per* filed with the Sixth Circuit Court of Appeals a claim of appeal from the district court's final judgment on July 8, 2003, and its award of sanctions on October 15, 2003. The court of appeals considered both appeals jointly. On September 3, 2004, it affirmed the district court with further comment. [Appendix B.] On September 27, 2004, it also dismissed the Tingleys' petition for rehearing without comment. [Appendix A.]

REASONS FOR GRANTING THE WRIT

A. THE SIXTH CIRCUIT'S DENIAL OF THE TINGLEYS' STANDING TO BRING A *QUI TAM* ACTION *IN PRO PER* ON BEHALF OF THE U.S. GOVERNMENT CONFLICTS WITH THE NINTH CIRCUIT AND DOES NOT RESOLVE THE SPLIT AMONG THE DISTRICT COURTS.

The Sixth Circuit affirmed without comment or analysis the district court's decision that the Tingleys *in pro per* had no standing to bring and maintain a False Claim Act *qui tam* action on behalf of the U.S. Government. This case presents a substantial question of whether *pro se* relators may bring *qui tam* actions. The Tingleys originally brought this action in the name of their non-profit corporation Local Area Watch, Inc. After finding out that as non-attorneys they could not

properly represent Local Area Watch in this action, they requested the opportunity to amend their complaint. The district court granted their motion to amend the complaint on June 28, 2002 to maintain the action *pro se* in only their individual capacity.

The U.S. Justice Department, in particular attorney Patrice Shelburne, was fully aware that the Tingleys were bringing the action *pro se* on behalf of the government. Although the Justice Department informed them of its intent not to intervene in the case, Ms. Shelburne stated that the government took seriously the allegations of illegal hazardous waste removal and requested that the Tingleys keep the government informed of their progress. Similarly, even after a number of hearings, the district court did not inform the Tingleys that they could not appear without counsel.

Yet, in its Opinion of June 13, 2003, [Appendix F] the district court declared that the Tingleys' *qui tam* action was a "dressed up" version of personal grievances with the respondents. It granted sanctions and dismissed the Tingleys' complaint for failure to state a claim upon which relief may be granted because "*pro se* parties are not authorized to represent the United States in bringing a *qui tam* action." [Appendix D.] Later the district court explained that it is "at a loss to explain how plaintiffs could have reasonably believed that they could represent the interests of the United States in this lawsuit when as *pro se* parties they could not even represent the interests of the corporations they owned and controlled. Any inquiry by plaintiffs would have revealed that William Q. Tingley and William Q. Tingley III could not file or maintain this lawsuit *pro se*." [Appendix D.]

The district court relied on a 1951 Eighth Circuit case and a California district court case to support its rationale that *pro*

se plaintiffs may not bring a *qui tam* action on behalf of the United States. See *United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951); *United States ex rel. Schwartz v. TRW, Inc.*, 118 F. Supp.2d 991, 994 (C.D. Cal. 2000). According to the district court, "any inquiry by plaintiffs would have revealed" this rule of law. However, this was not brought to the Tingleys' attention by either Ms. Shelburne or the district court. The Tingleys *in pro per* are at a loss to explain how they should have known this rule when, according to the *TRW* court, only two cases have examined this issue. See *TRW*, 118 F. Supp. 2d at 994.

In fact, a review of federal district court case law reveals that this important issue is actually unresolved, which is why the Tingleys are submitting a writ of certiorari. Only three months after the *TRW* decision, another district court held that "FCA claims are fraud claims assigned by the Government to the private litigant when the Government declines to intervene [and thus plaintiffs are] allowed to proceed *pro se*." *United States ex rel. Trice v. Westinghouse Hanford Co.*, 2000 U.S. Dist. LEXIS 8838, *32 (E.D. Wash. Mar. 1, 2000). [See Appendix G for relevant part.]

Trice based its assignment theory on *United States ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert denied*, 510 U.S. 1140 (1994), a Ninth Circuit decision which held that "Congress intended to assign the government's fraud claims to individual *qui tam* plaintiffs in cases where the government itself chooses not to pursue such claims." *Trice*, 2000 U.S. Dist. LEXIS 8838, *28 (*quoting Boeing*, 9 F.3d at 748). The government's right to intervene is treated as a conditional assignment and "if the government declines to prosecute the alleged wrongdoer, the *qui tam* plaintiff effectively stands in the shoes of the government." *Id.* According to *Trice*, this includes a *pro se* plaintiff.

Trice recognized the concerns of allowing a *pro se* plaintiff to proceed on behalf of the government. However, the court states:

> [T]he FCA meticulously addresses the procedure by which a *qui tam* plaintiff may bring an action. Congress easily could have inserted a provision requiring a *qui tam* plaintiff to retain counsel. Congress even could have forsaken *qui tam* plaintiff standing altogether, deciding instead that only the Attorney General can properly bring an FCA claim on behalf of the Government. Congress did neither of these. *Qui tam* plaintiffs are accorded standing under the FCA, and their participation is described in such a way that it is easily interpreted as an assignment of a fraud claim by the Government to a private plaintiff.

Id. at *29-30. The *Trice* court addressed *United States v. Onan*, 190 F.2d 1 (8th Cir. 1951), the decision barring *pro se* relators that the district court relied on in its Opinion. However, it stated that *Onan* "was based on the old FCA, 31 U.S.C. § 232. The FCA subsequently has been amended five times [and *Onan*] was rendered far before the Ninth Circuit finding that an FCA claim is an assignable fraud claim." *Trice*, 2000 U.S. Dist. LEXIS 8838, *31.

In sum, when the U.S. Government declines to intervene the claim becomes the assignee's claim and an assignee may litigate his own claim if he wishes. Thus, under *Trice* relators are allowed to proceed *pro se* in FCA *qui tam* actions.

B. THE SIXTH CIRCUIT'S AFFIRMATION OF THE BASIS FOR SANCTIONS CONFLICTS WITH THE DECISIONS OF THE MICHIGAN COURTS.

The Sixth Circuit, by affirming the district court without further analysis, predicated the injunction and sanctions against the Tingleys, in part, upon the erroneous finding that they had a "history of abusive litigation" of which this lawsuit was the latest episode. Proceedings in the Kent County Circuit Court and the Michigan Court of Appeals have supported the merit of the Tingleys' state-court actions that allegedly constitute a pattern of abuse. In particular, the Michigan Court of Appeals voided as having no authority a lower court order which the district court ruled Tingley III had violated and so justified the injunction and sanctions against the petitioners for that reason.

In its justification of sanctions, the district court stated:

> Plaintiff Tingley III violated [the July 2002 order of the state court in the *Tingley v. 900 Monroe* case] requiring prefiling review when he filed the complaint in the *Kortz* case. The court finds that requiring plaintiffs to pay all costs and attorney's fees imposed in this case and to post a bond before allowing plaintiffs to file another civil lawsuit against defendants is the least restrictive remedy that bears any hope of deterring future frivolous lawsuits. June 13, 2003, Opinion in companion case, *Tingley v. Grand Rapids*, W.D. Mich. Case No. 1:02-CV-00673, which the district court incorporated into its opinion in this case. [See Appendix F.]

The Michigan Court invalidated the July 2002 order, the alleged violation of which was the district court's rationale for an injunction and sanctions, by stating:

> [W]e are compelled to note that the provision of the July 2002 order in [the *Tingley v. 900 Monroe* case] that purports to prohibit plaintiff from filing additional complaints without the approval of the chief judge has no authority in subsequent proceedings and is void in this case. *Tingley v. Kortz*, Mich. App. Case No. 245974, pending publication (decided June 24, 2004), emphasis added.

Furthermore, the Sixth Circuit, in its affirmance of the district court, ignored notice of other state court decisions that confirmed that the cases it had concluded were a part of a pattern of abusive litigation justifying sanctions under 31 U.S.C. Section 3730(d)(4) were in fact meritorious. In doing so, it contradicted this court's ruling in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). This court explicitly prohibited the sort of retrospective rationalization of sanctions that the district court engaged in and the Sixth Circuit affirmed:

> [I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is

> rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. *Christiansburg*, 434 U.S. at 421.

A review of the Tingleys' litigation history in light of both the rulings of the Michigan courts and the only finding of bad faith by the district court was the Tingleys' *in pro per* appearance before it makes clear that even if the Tingleys should not have prevailed, there exists pursuant to *Christiansburg* no basis for sanctions.

C. THE SIXTH CIRCUIT'S AFFIRMATION OF THE DISMISSAL OF THE TINGLEYS' CITIZEN SUIT CLAIMS CONFLICTS WITH THE DECISIONS OF THIS COURT.

Neither the district court in its lengthy opinion disposing of this case nor the Sixth Circuit explained the rationale for dismissing the Tingleys' CERCLA and Solid Waste Disposal Act citizen suits. Because district court dismissed, and the Sixth Circuit affirmed without further statement, the Tingleys' FCA claims on the basis that they lacked standing, it would appear that they used the same rationale regarding the Tingleys' citizen suits. However, this court's decisions make clear that the Tingleys do have standing to bring these citizen suit actions.

The respondents, in violation of CERCLA and the Solid Waste Disposal Act, released or caused to released 27,000 tons of soil contaminated with toxic concentrations of two dozen hazardous substances, including arsenic, lead, and mercury, into a densely developed urban environment. The

Tingleys worked daily next-door to the site where Pioneer and Dykema Excavators excavated and stockpiled this contaminated material. In fact, the bulk of this waste was transported off the Berkey & Gay project site via the driveway to the Tingleys' manufacturing plant. Furthermore, both of the Tingleys reside within a mile and a half of the filtration plant where Pioneer and Dykema Excavators dumped most of the contaminated soil excavated from the Berkey & Gay site.

Thus, the Tingleys and their property have suffered exposure, and a continued threat of exposure, to the hazardous substances released by the respondents that places them within the "zone of interest" of remedying the respondents' violations of CERCLA and the Solid Waste Disposal Act. *Bennett v. Spear*, 520 U.S. 154 (1997). Moreover, the Tingleys have standing under 42 U.S.C. 6972(a) of the Solid Waste Disposal Act as "any person" to remedy an "imminent and substantial endangerment" to the environmental or human health that can be redressed by an injunction. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996).

CONCLUSION

This Court should grant the petition and reverse the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

Wm Q. Tingley III
William Q. Tingley
1009 Ottawa Avenue, N.W.
Grand Rapids, Michigan 49503
(616) 454-9810

Petitioners in pro per

Dated December 23, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 03-1889, 03-2312

[Filed September 27, 2004]

UNITED STATES OF AMERICA ex rel. Plaintiff,	)
WILLIAM Q. TINGLEY, WILLIAM Q. TINGLEY III Plaintiffs-Appellants	)
v.	)
900 MONROE LLC, et al. Defendants-Appellees	)

BEFORE: KEITH, MARTIN, and ROGERS, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellants,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green [stb]
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-1889/2312

[Filed September 3, 2004]

UNITED STATES OF AMERICA, ET AL., Plaintiffs-Appellants,	)
v.	)
900 MONROE, ET AL., Defendants-Appellees.	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Before: KEITH, MARTIN, and ROGERS; Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. William Q. Tingley, III, an executive with Proto-Cam, Inc., his son, William Q. Tingley, and their business partner, Daniel R. Bradley, appeal the district court's grant of summary judgment and imposition of sanctions. Appellants argue that the district court erred in 1) dismissing their claims under the False Claims Act rather than giving appellants an opportunity

to obtain representation and 2) dismissing their citizen suits under the Comprehensive Environmental Response, Cleanup, and Liability Act and the Solid Waste Disposal Act. Appellants claim that the district court 1) had no basis for finding that appellants had a history of abusive litigation; 2) had no basis for finding that appellants maintained this lawsuit in bad faith; 3) should have notified appellants prior to issuing its decision that they must be represented by a licensed attorney; 4) abused its discretion in awarding sanctions and costs; 5) abused its discretion in issuing its injunction; and 5) was disqualified to impose sanctions in light of the district judge's bias in being a member of the Grand Rapids legal community. We have reviewed the district court's judgment and the appellate briefs in the light most favorable to the appellants and we are not persuaded that the district court erred in any way. We affirm the judgment in its entirety, and reference and incorporate the district court's opinion.

APPENDIX C

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:02-cv-319

[Filed October 2, 2003]

UNITED STATES OF AMERICA *ex rel.* WILLIAM Q. TINGLEY, et al., Plaintiffs,	)
v.	)
900 MONROE, L.L.C., et al., Defendants.	)

Honorable Robert Holmes Bell

JUDGMENT FOR COSTS AND ATTORNEY'S FEES

In accordance with the accompanying memorandum opinion and the court's June 13, 2003 opinion and judgment,

IT IS ORDERED that judgment be and hereby is entered in favor of defendants Frank Marshall and Superior Environmental Corporation in the amount of $8,061.10

against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

IT IS FURTHER ORDERED that judgment be and hereby is entered in favor of defendant Dykema Excavators, Inc. in the amount of $7,727.50 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

IT IS FURTHER ORDERED that judgment be and hereby is entered in favor of defendant Dickinson Wright P.L.L.C. in the amount of $7,854.00 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

IT IS FURTHER ORDERED that judgment be and hereby is entered in favor of defendant Fifth Third Bancorp in the amount of $20,133.40 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

IT IS FURTHER ORDERED that judgment be and hereby is awarded in favor of defendants 900 Monroe, L.L.C.; 940 Monroe L.L.C.; Pioneer, Incorporated; and Thomas E. Beckering in the amount of $4,760.00 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

IT IS FURTHER ORDERED that judgment be and hereby is entered in favor of defendant William J. Fisher III in the amount of $4,760.00 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

IT IS FURTHER ORDERED that judgment be and hereby is entered in favor of defendant John H. Logie in the amount

of $7,950.00 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

Date: October 2, 2003

/s/Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:02-cv-319

[Filed October 2, 2003]

UNITED STATES OF AMERICA *ex rel.* WILLIAM Q. TINGLEY, et al., Plaintiffs,	)
v.	)
900 MONROE, L.L.C., et al., Defendants.	)

Honorable Robert Holmes Bell

OPINION

On June 13, 2003, this court granted defendants' motion to dismiss plaintiffs' purported *qui tam* lawsuit, granted defendants' motions for an award of their reasonable costs and attorney's fees incurred in defending this lawsuit pursuant to 31 U.S.C. § 3730(d)(4), and imposed a permanent injunction to deter future abusive lawsuits by plaintiffs William Q.

Tingley III, William Q. Tingley and their corporation, The Local Area Watch. (docket #'s 115, 116). The court's judgment established a schedule for the presentation of defendants' attorney's fees, expenses and costs and the plaintiffs' response. Defendants have submitted documentation regarding their attorney's fees and costs (docket #'s 118, 120, 122, 124, 126, 132, 133, 135), plaintiffs have filed objections (docket # 139),[1] and the matter is ready for decision.

The objections made by William Q. Tingley III and William Q. Tingley are as follows: (1) awarding any sanctions against plaintiffs constitutes an abuse of discretion; (2) sanctions cannot be imposed under 31 U.S.C. § 3740(d)(4) because the court did not make a finding that monetary sanctions were necessary for purposes of deterrence; (3) the aggregate total of defendants' attorney's fees and costs is too high; (4) the "Pioneer Defendants," 900 Monroe, 940 Monroe, Pioneer, Fisher and Beckering are guilty of misconduct and should not be awarded attorney's fees or costs; (5) defendants Dykema Excavators, Superior Environmental, and Marshall are guilty of misconduct and should not be awarded attorney's fees or costs; (6) defendants Fifth Third, Dickinson Wright and Logie should be denied costs and attorney's fees on the basis of misconduct; (7) defendants Dickinson Wright and Fisher should be denied recovery because they were proceeding *pro se*; (8) defendant Logie is not entitled to recover attorney's fees, expenses and costs because (a) he was represented by the City Attorney,

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[1] William Q. Tingley and William Q. Tingley III have filed a notice of appeal of the court's June 13, 2003 judgment to the United States Court of Appeals for the Sixth Circuit. (docket # 137). The Local Area Watch did not appeal the court's judgment. The corporation did not file any objection to defendants' applications for costs and attorney's fees.

and (b) the City Attorney's rate of $150 was too high. Upon review, the court finds that plaintiffs' objections are without merit.

Discussion

1.

Plaintiffs William Q. Tingley III and William Q. Tingley have filed a blanket objection claiming that any award of sanctions against them constitutes an abuse of discretion. Plaintiffs' argument is untenable in light of the history of abusive litigation chronicled in the court's June 13, 2003 opinion in this case and in the seventy-seven page opinion in the companion case of *William Q. Tingley III, et al., v. City of Grand Rapids, et al.*, 1:02-cv-673 (W.D. Mich. June 13, 2003) ("*Tingley III* case). Both opinions are incorporated herein by reference.

Plaintiffs argue that because they filed the complaint in this case before judgment was entered in favor of defendants in multiple state court lawsuits initiated by plaintiffs and their corporations, this lawsuit could not have been "filed" in bad faith. The bad faith maintenance of this lawsuit was an alternative basis upon which the court decided that sanctions were appropriate. Plaintiffs argument conveniently ignores this aspect of the court's holding. Furthermore, plaintiffs' argument is based upon a misleadingly selective chronology of events.

This purported *qui tam* lawsuit was filed on May 8, 2002. The Tingleys' corporation, The Local Area Watch ("LAW") was identified on the face of the complaint as the party purporting to bring claims on behalf of the United States. William Q. Tingley III, a non-attorney, filed this lawsuit on

behalf of the corporation as its "Executive Director." As of the date the complaint was filed, William Q. Tingley III was not a stranger to the concept that a corporation's interests could only be represented in court through licensed counsel. Attorneys Douglas W. VanEssen and Lee T. Silver were at that time representing the Tingleys' corporations in the "*940 Monroe* case" against 940 Monroe, L.L.C. and Pioneer Incorporated. *See Proto-CAM, Inc., et al. v. 940 Monroe, et al.*, No. 00-08231-CZ (Kent County Circuit Court). Attorney Peter W. Steketee was representing LAW in the "*LAW* case." *See Local Area Watch v. City of Grand Rapids, et al.*, No. 02-00218-CZ (Kent County Circuit Court). The history of the *LAW* case and the *940 Monroe* case is summarized on pages seven through fourteen of the court's June 13th opinion in Case No. 1:02-cv-673. Any doubt with regard to Mr. Tingley's knowledge that a non-attorney could not represent a corporation's interests in court was eliminated on May 17, 2002, at the very latest. On May 17, 2002, Judge Soet, the presiding Judge in the case of *Proto-CAM, Inc., et al. v. Robert F. Wardrop, et al.*, Case No. 02-03723-NZ (Kent County Circuit Court)(subsequently amended and renamed *William Q. Tingley III, et al. v. 900 Monroe L.L.C., et al.*, ("*900 Monroe* case"),[2] expressly advised William Q. Tingley III that *pro se* plaintiffs could only represent themselves in pursuit of their own individual claims. The

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[2] The history of the *900 Monroe* case is summarized on pages 16 through 28 of the court's June 13th opinion in Case No. 1:02-cv-673. The plaintiffs in the *900 Monroe* case were William Q. Tingley III, William Q. Tingley and Daniel R. Bradley. The defendants in that lawsuit were 900 Monroe L.L.C.; 940 Monroe L.L.C.; City of Grand Rapids; Dickinson Wright, P.L.L.C.; Dykema Excavators Inc.; Fifth Third Bancorp; Pioneer Incorporated; Todd R. Dickinson; William J. Fisher III; John H. Logie; and Robert F. Wardrop II.

interests of corporations and other claimant's interests could only be represented in court by licensed attorneys. The hearing transcript shows that prior to the May 17, 2002 defendants had filed motions and supporting briefs stating that the *900 Monroe* lawsuit should be dismissed because non-attorney William Q. Tingley III could not represent corporations in court. (HT, 9-10, 14, docket # 25, Ex. 8, Case No. 1:02-cv-673). In light of this context, it appears clear that William Q. Tingley III filed this lawsuit in bad faith. He certainly continued with the lawsuit in bad faith on and after May 17, 2002.

Because this lawsuit was filed under the guise of being a *qui tam* action, the complaint was filed under seal, and it remained under seal while the United States determined whether to exercise its right to intervene. On June 28, 2002, while the original complaint remained under seal, William Q. Tingley III and William Q. Tingley filed an amended complaint purporting to remove the corporation LAW as the named plaintiff and substituting themselves in that position. The court is at a loss to explain how plaintiffs could have reasonably believed that they could represent the interests of the United States in this lawsuit when as *pro se* parties they could not even represent the interests of the corporations they owned and controlled. Any inquiry by plaintiffs would have revealed that William Q. Tingley and William Q. Tingley III could not file or maintain this lawsuit *pro se*.

On October 7, 2002, the United States declined to intervene. (docket # 10). By October 7, 2002, judgment had been entered in favor of the defendants in the *LAW* case, the bench trial in the *940 Monroe* case had concluded, and in the *900 Monroe* case judgment had been entered in favor of the defendants and state court had imposed sanctions against William Q. Tingley III for the unauthorized practice of law,

and monetary sanctions in excess of $29,000 had been imposed by the state court against William Q. Tingley III and the Tingleys' corporations Proto-CAM, Inc., Bend Tooling, Inc., and Tennine Corporation. (*Tingley III* case, 6/13/2003 Op. at 23-28). It was not until October 15, 2002, that this court ordered the complaint and amended complaint unsealed. As of October 15, 2002, none of the defendants had incurred any of the costs and attorney's fees that they now seek to recover.[3] Having lost multiple lawsuits against defendants in state court, having been subjected to thousands of dollars in sanctions by the state court for litigation abuses, and with certain knowledge that as non-attorneys they could not represent the interests of anyone other than themselves, William Q. Tingley III and William Q. Tingley nonetheless elected to proceed with this frivolous lawsuit and caused it to be served upon the defendants. A review of the chronology of events only serves to reinforce the necessity of imposing sanctions against the plaintiffs in this case.

2.

Plaintiffs argue that this court cannot impose sanctions upon them pursuant to section 31 U.S.C. § 3730(d)(4) because the court did not make a finding that sanctions were necessary for purposes of deterrence. Plaintiffs present the argument in these terms:

> [T]he Court at some length in its Opinion justified its permanent injunction restricting the Plaintiffs' access to the federal courts as necessary, because it believes

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[3] On November 15, 2002, the Michigan Court of Appeals affirmed the trial court's decision, and the Tingleys did not seek further appellate review. *See Tingley v. 900 Monroe, et al.*, Case No. 242445 (Mich. Ct. App. Nov. 15, 2002).

> that monetary sanctions will not be effective. If the Court believes that a sanction will not be effective, then it is not necessary, and the only sanction the Court can impose is a necessary one. Therefore, the Court cannot impose sanctions on the Plaintiffs under Section 3730(d)(4) because it has not found that they are necessary for deterrence.

(Objections at 6, docket # 139). Plaintiffs' argument is frivolous. The court expressly found that the imposition of monetary sanctions was necessary to deter plaintiffs from their continued pursuit of frivolous lawsuits against defendants on page eight of its June 13 opinion. The thousands of dollars in sanctions imposed by the state courts had failed to deter the Tingleys.[4] Monetary sanctions alone would not deter these plaintiffs from filing clearly frivolous, clearly vexatious lawsuits against defendants for purposes of harassment. The court held that further protection in the form of injunctive relief was necessary and appropriate. (6/13/2003 Op. at 8).

3.

William Q. Tingley III and William Q. Tingley have not objected to the reasonableness of the time expended or the hourly rates as set forth in any of the defendants' documentation in support of their request for attorney's fees, with the sole exception of the hourly rate charged with respect to the City Attorney's defense of Mayor John Logie. Instead, plaintiffs seek to lump all defendants together and make this argument:

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[4] Plaintiffs not only pursued this lawsuit in bad faith, but in September 2002 they also expanded upon it by filing their complaint in the *Tingley III* case.

> [T]he Court stated that this "purported *qui tam* action was [a] 'dressed up' version of plaintiffs' personal grievances and nearly identical to a claim previously dismissed." (Opinion, Page 7. Emphasis added). If so, then it was utterly unnecessary for the Defendants to rack up $75,862.89 in fees and expenses to defend against claims supposedly identical to ones that they had already encountered and defeated.
>
> Also, this lawsuit never went beyond the initial round pleadings. Rule 16 conference was never held. There was no discovery. Furthermore, the bills of costs submitted by the Defendants indicate the existence of joint defense agreement which would mitigate the expense of defense of this lawsuit. Yet the defendants have collectively submitted bills that would add up to more than two solid months of a lawyer' s time in a lawsuit that involved them only eight months ago. In awarding sanctions, the Court must determine that the Defendants expenses and costs claimed were necessary and the amount claimed is reasonable. *Majeske v. City of Chicago*, 218 F.3d 816, 824 (7th Cir. 2000).

(Objections at 10-11).

The original complaint in this case was filed in the name of The Local Area Watch, a corporation owned and operated by the Tingleys. The purported *qui tam* complaint consisted of 106 numbered paragraphs spanning twenty-nine pages and naming a dozen defendants: 900 Monroe, L.L.C.; 940 Monroe L.L.C.; Pioneer Incorporated; Dykema Excavators, Inc.; Fifth Third Bancorp; Superior Environmental Corp.; Prein & Newhoff, Inc.; Dickinson Wright P.L.L.C.; Frank D. Marshall; John Logie; and Thomas Beckering. The amended complaint was even more expansive, consisting of

thirty-five pages and 130 numbered paragraphs. The same document also purported to replace the original plaintiff LAW with William Q. Tingley and William Q. Tingley III. Plaintiffs were the masters of their complaint. It was their deliberate choice to name this large group of defendants.[5] The plaintiffs engaged in meritless motion practice (docket # 109). Litigation is expensive, and as experienced businessmen, the plaintiffs knew it. Plaintiffs' argument that the aggregate total of defense costs is "too high" rings hollow. The Tingleys elected to initiate this type of lawsuit against a laundry list of defendants. Plaintiffs argue, without any support, that costs should have been lower because defendants entered into a joint defense agreement. The court's review of the individual billing records shows that attorney's fees and costs were indeed lower than they otherwise would have been if defendants had not engaged in cooperative efforts to reduce litigation expenses for their clients. The total award of costs and attorney's fees faced by plaintiffs is already lower than it would have been absent such efforts. Plaintiffs are not entitled to any further reduction based upon the existence of a joint defense agreement.

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[5] The Tingleys even sought to further expand this lawsuit by combining it with the *Tingley III* case: a multi-count complaint naming a dozen defendants: City of Grand Rapids; Dickinson Wright P.L.L.C.; Fifth Third Bancorp; Spectrum Health Corporation; Warner, Norcross & Judd L.L.P.; Todd R. Dickinson; William J. Fisher III; Dennis B. Leiber; John H. Logie; Daniel A. Ophoff; H. David Soet; and Robert F. Wardrop. The defendants were primarily the judges presiding over and the attorneys representing party opponents in four state court lawsuits based upon factual allegations which in some cases reached back nearly a decade.

4.

Plaintiffs argue that defendants 900 Monroe, 940 Monroe, Pioneer Incorporated, William Fisher and Thomas Beckering ("Pioneer Defendants") should not recover any of their attorney's fees "because of their misconduct in this case." (Objections at 7). Plaintiffs argue that these defendants mislead the court in a "Memorandum Regarding Rule 16 Conference" concerning evidence the government had relied upon to exonerate defendants of plaintiffs' charge that they had unlawfully dumped hazardous waste. This is a reformulation of an argument plaintiffs made in a motion for Rule 11 sanctions which the court rejected. (Op. at 3-6, docket # 115). These defendants did not mislead the court as plaintiffs contend. Nothing in plaintiffs' argument provides a basis upon which to deny these defendants of the costs and attorney's fees they have expended in defending this lawsuit. A federal court's analysis of a petition for statutory attorney's fees generally begins with review of the "lodestar": "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In calculating the "reasonable hourly rate" component of the lodestar computation, a trial court should initially assess the "prevailing market rate in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Adcock-Ladd v. Secretary of Treasury*, 227 F.3d 343,350 (6th Cir. 2000). The prevailing market rate is "that rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Adcock-Ladd*, 227 F.3d at 350. In the case of a private attorney, where the attorney requesting fees has well-defined billing rates, those rates can be used to help calculate a reasonable rate for the fee award. See *Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir. 1995).

Attorney Todd R. Dickinson has presented the court with attested time records reflecting the expenditure of 47.6 hours in the defense of this case on behalf of his clients: 900 Monroe, L.L.C.; 940 Monroe L.L.C.; Pioneer, Incorporated; Thomas E. Beckering and William J. Fisher. (docket # 135). Attorney Dickinson has been a member of the bar of this court since 1982 and is experienced in the defense of complex civil litigation. His rate of $200 per hour is reasonable and consistent with rates charged by other attomeys in the community with similar experience.

Multiplication of hours by hourly rate yields a lodestar amount of $9,520.00. This amount is divided by attributing one-half to the defense of defendant Fisher and the other half to the remaining four defendants. With regard to defendant Fisher, plaintiffs argue that Fisher should not recover because he proceeded in the defense of this matter *pro se*. The record is completely to the contrary. Defendant Fisher was represented in this lawsuit by a licensed attomey. Defendant Fisher never appeared *pro se*. Attorney Todd R. Dickinson represented Fisher in court in the context of an agency relationship. Under such circumstances, an award of attorney's fees is appropriate. See *Bond v. Blum*, 317 F.3d 385, 399-400 (4th Cir. 2003).

The so-called "Pioneer Defendants" did not apply to recover any of their costs. Plaintiffs cite the Seventh Circuit's decision in *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 945 (7th Cir. 1997), in support of an argument that, in its discretion, the court should deny the Pioneer Defendants their costs. (Objections at 7). If anything, the Seventh Circuit's *Weeks* decision would support awarding costs if they had been sought. In *Weeks*, the Seventh Circuit rejected an argument by the plaintiff that costs should not be awarded based on alleged misconduct by the defendant and its

attorneys. In reaching its decision finding that costs should be recovered, the Seventh Circuit emphasized the strong presumption in favor of awarding costs and the difficult burden of overcoming that presumption.

> We have consistently interpreted Rule 54(d) as providing a strong presumption that the prevailing party will recover costs, with the ultimate decision resting within the district court's discretion .... The presumption in favor of awarding costs to the prevailing party is difficult to overcome, and the district court's discretion is narrowly confined - the court must award costs unless it states good reasons for denying them.

126 F.3d at 945.

In summary, judgment will be entered in favor of defendants 900 Monroe, L.L.C.; 940 Monroe L.L.C.; Pioneer, Incorporated; Thomas E. Beckering in the amount of $4,760 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally. Judgment will be entered in favor of defendant Fisher in the amount of $4,760 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

5.

Plaintiffs argue that defendants Superior Environmental Corporation, Frank Marshall, and Dykema Excavators, Inc. shouldnot be awarded their attorney's fees, expenses, or costs because they "endorsed the Pioneer Defendants' Rule 16 Conference Memorandum without reservation knowing that its assertions concerning the government's investigation was false." (Objections at 7). This argument is rejected for the

reasons set forth in the previous section of this opinion. Attorney David W. Centner has filed an affidavit in support of the application for costs and attorney's fees on behalf of defendants Superior Environmental Corporation and Frank Marshall. (docket # 120). Marshall and Superior Environmental seek to recover $8,820.00 in attorney's fees and $392.13 in costs. Attorney Centner's affidavit identifies the attorneys performing the majority of services on behalf of these defendants: David W. Centner, at a rate of $190 per hour and James P. Enright at a rate of $185 per hour. Mr. Centner's affidavit sets forth his own qualifications and those of Mr. Enright. The court finds that the total attorney hours expended in defending this lawsuit by attorneys Centner and Enright and their hourly rate are reasonable. Defendants' invoice contains entries reflecting services performed by other attorneys "KGY" on 11/11/02, .2 hours; "FDM" on 1/8/03 and 1/22/03, 7.4 hours; and "JLW" on 2/4/03, 2/13/03, 2/24/03, 2/27/03, .9 hours. Unfortunately, the invoice does not reflect the hourly rate charged for the services rendered by these attorneys. Attorney Centner's affidavit does not provide any evidence supporting a rate in excess of $100 per hour, typical of a new associate for time billed by KGY, FDM and JLW. The court will not undertake the exercise of separating these charges from each invoice when defense counsel made no such attempt. The court will assume the highest rate of$195 per hour had been charged and make an appropriate reduction. Multiplying the 8.5 hours and $95 per hour excess results in a reduction of $807.50 in attorney's fees.

Taxable costs are generally covered by chapter 123 of the Federal Judicial Code, 28 U.S.C. §§ 1911-1929. Items of taxable cost are enumerated in 28 U.S.C. § 1920. A prevailing party is entitled to the taxation of costs "as of course" unless the court in its discretion finds substantial

reason not to do so. FED. R. CIV. P. 54(d); see *Hadix v. Johnson*, 322 F.3d 895,899 (6th Cir. 2003), petition for cert. filed, (U.S. June 3, 2003) (No. 02-11088). The majority of the costs defendants Marshall and Superior Environmental seek to recover, $342.58 of the $392.13 total, are attributable to Westlaw research costs. Such costs are not recoverable under section 1920 in addition to the attorney's fees. See *United States ex rel. Evergreen Pipeline Constr. Co.*, 95 F.3d 153, 173 (2d Cir. 1996); *Jones v. Unisys Corp.* 54 F.3d 624, 663 (10th Cir. 1995); *Harco, Inc. v. American Nat. Bank & Trust Co.*, 38 F.3d 1429, 1440-41 (7th Cir. 1994); *AM Properties v. Chappel Hill*, 202 F. Supp.2d 451,455-56 (M.D.N.C. 2002).

Section 3730(d)(4) allows a defendant to recover "expenses" rather than costs. 31 U.S.C. § 3730(d)(4) Defendants have not cited, and the court has been unable to locate, any case where Westlaw or other computer assisted legal research has been awarded as an "expense" under section 3730(d)(4) in addition to an attorney's hourly fee.[6] Out of an abundance of caution, the court will decline to break

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[6] Federal case law with regard to the relationship between "expenses" and "costs" under 31 U.S.C. § 3730(d) is at an early stage of development. *See United States ex rel. Costner v. United States*, 317 F.3d 889, 891 (8th Cir. 2003),petition for cert. filed, (U.S. July 8, 2003) (No. 03-65);*United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1413 (9th Cir. 1995). None of the parties briefed the issue. The court is in agreement with the Eighth Circuit's recent Costner decision finding that regardless of the statutory construction arguments concerning section 3730(d)(4), the statute does not displace the district court's authority to award costs under Rule 54 and the presumption in favor of awarding costs to prevailing parties. *Costner*, 317 F.3d at 891.

new ground. Westlaw costs will be denied. The $.95 sought for long distance telephone calls on January 15, 2003, is not a taxable cost under section 1920. *See Hull v. Ohio Educ. Ass'n*, 984 F. Supp. 1144, 1146 (S.D. Ohio 1997) (collecting cases). Defendants' remaining costs of $48.60 are reasonable and properly awarded pursuant to section 1920. Judgment will be entered in favor of defendants Frank Marshall and Superior Environmental Corporation in the amount of $8,061.10 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

Gary P. Schenk, attorney for defendant Dykema Excavators, Inc., has submitted an affidavit in support of his client's application for fees. (docket # 118). This defendant seeks an award of $7,681.75 in attorney's fees and $124.93 in costs. The hours expended in defending Dykema Excavators are reasonable. Attorney Schenk has been a licensed attorney since 1969 and is a shareholder in Schenk & Boncher, P.S. Attorney Schenk attached to his affidavit his firm's invoice for its services. Attorney Schenk's time is billed at $175 per hour, a reasonable rate for an attorney of his experience within the Grand Rapids area market. Defendant is entitled to recover only a portion of its costs. Defendant is not entitled the $56.83 in "travel expenses." *See AM Properties*, 202 F. Supp.2d at 455; *Embotelladora Agral Regiomontana, S. Aide C.U. v. Sharp Capital, Inc.*, 952 F. Supp. 415, 418 (N.D. Tex. 1997). Defendant is not entitled to recover the amounts sought for postage and delivery under section 1920. *See Communications Workers of Am. v. Ector County Hosp. Dist.*, 241 F. Supp. 2d 617,637 (W.D. Tex. 2002); *Bandera v. City of Quincy*, 220 F. Supp. 2d 26, 48 (D. Mass. 2002). Defendant is entitled to recover its photocopying costs of $45.75. Therefore, judgment will be entered in favor of defendant Dykema Excavators, Inc. in the amount of

$7,727.50 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

6.

William Q. Tingley and William Q. Tingley III argue that defendants Fifth Third Bancorp, Dickinson Wright, and Logie should be denied attorney's fees, expenses and costs because they "concocted a false procedural history of litigation involving the Plaintiffs or entities they controlled which the Court uncritically accepted despite the obvious factual problems with sequence of events and the actual claims pressed in the state courts." (Objections at 9). Plaintiffs' objections are rejected for the reasons set forth in section 1 of this opinion.

Attorney Rock A. Wood has filed an affidavit in support of defendant Dickinson Wright P.L.L.C.'s application for an award of attorney's fees. (docket # 132). Defendant seeks an award of $7,901.50. In the application for attorney's fees and costs in the Tingley III case, Attorney Wood charged a rate of $235 per hour. Here, he seeks to recover at a rate of $260. Attorney Wood's affidavit does not provide any explanation regarding why higher hourly rates would be attributable to this lawsuit. Consistent with the court's opinion in the Tingley III case, the court finds that $235 is an appropriate market rate for Attorney Wood's time. Attorney Perdue's rates are consistent and appropriate market rates in both cases. With regard to the number of hours, defendant states as follows:

> The defense of this matter was especially time consuming in light of Plaintiff's [sic] propensity for filing frivolous motions, correspondence and pleadings, and their choice of the *qui tam* action as the

> vehicle for their vexatious filings. Dickinson Wright was required to analyze, decipher and respond to a 130 paragraph, 35 page complaint, as well as file a motion for judgment on the pleadings and brief in support, brief in opposition to Plaintiffs' motion to amend the First Amended Complaint, and a memorandum regarding Plaintiffs' demand for a Rule 16 conference. Additionally, Dickinson Wright was required to review numerous pleadings (consisting of hundreds of pages) filed by Plaintiffs and co-defendants, as well as attend court hearings.

(Wood Aft., ¶ 7). Upon review, the court finds that the 1.9 hours expended by Attorney Wood and the 37.1 hours expended by Attorney Perdue were reasonable. Judgment will be entered in favor of defendant Dickinson Wright P.L.L.C. in the amount of $7,854.00 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

Attorney John Ferroli has filed an affidavit on behalf of his client Fifth Third Bancorp's application for costs and attorney's fees. (docket # 124). Defendant seeks $30,129.65 in attorney's fees and $3,098.35 in costs. Plaintiffs have not disputed that Dykema Gossett assumed a leadership role in the defense of this lawsuit on behalf of its client. (Ferroli Aff. ¶ 3). The total number of hours expended of 151.15 hours (28.7 hours of partner's time and 122.45 hours of associate time) is reasonable. The average rate for all time charged was $199 per hour. (Ferroli Aff. ¶ 4). Attorney Ferroli is an experienced member of the bar of this court. His hourly rate is $265 per hour. The court finds that this is a reasonable hourly rate, consistent with prevailing market rates for an attorney of his experience on a matter of this complexity in the Grand Rapids area. Attorney Ferroli was responsible for

22.85 hours, for a total fee of $6,055.25. This leaves a total of 5.85 hours of other partner time. The court will apply the conservative figure of $180 per hour for this other partner time, resulting in total attorney's fees for partner time of $7,108.25. Although the defendant's billing invoice reflects a variety of hourly rates charged for the time of a number of associates, Attorney Ferroli's affidavit does not provide the court with any information concerning these associates or how their hourly rates are "rates which lawyers of comparable skill and experience can reasonably expect to command" within this market. *See Adcock-Ladd*, 227 F.3d at 350. The court will apply the $100 per hour rate attributable to a new associate, multiplied by the 122.45 hours which results in an associate total of $12,245.00. Defendant Fifth Third Bancorp will be awarded total attorney's fees of$19,353.25. With regard to costs, the $2,278.50 defendant seeks for Westlaw/Lexis research will be denied for the reasons previously stated. The same is true for postage, fax and telecommunications totaling $39.90. Defendant is entitled to recover $780.15 in photocopying costs. Judgment will be entered in favor of defendant Fifth Third Bancorp in the amount of $20,133.40 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

7.

Plaintiffs argue that defendant Dickinson Wright, P.L.L.C. should be denied recovery of costs and attorney's fees because it proceeded *pro se* and *pro se* litigants are not

entitled to recover attorney's fees.[7] Dickinson Wright is a corporation. It cannot proceed in court *pro se*.

> "An organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or pro bono, and thus, there is always an attorney-client relationship." When a member of an entity who is also an attorney represents the entity, he is in an attorney-client relationship with the entity and, even though interested in the affairs of the entity, he would not be so emotionally involved in the issues of the case so as to distort the rationality and competence that comes from independent representation. Accordingly, a State's own attorneys representing the State may be awarded attorneys fees under a fee-shifting statute. See *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363 (7th Cir. 2000). And in-house counsel representing the corporation for whom they work may also be awarded attorneys fees. *See Textor v. Bd. Of Regents of Northern Ill. Univ.*, 711 F.2d 1387, 1396 (7th Cir. 1983) ("Defendants chose to hire in-house counsel because that was the most efficient means of handling a large amount of legal work .... [F]or every hour in-house counsel spent on this case, defendants lost an hour of legal services that could have been spent on other matters").
>
> Though representation of a law firm by one of its members presents an increased risk of emotional involvement and loss of independence, the law firm

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[7] Plaintiffs' argument with regard to defendant Fisher was addressed in section 4 of this opinion.

> still remains a business and professional entity distinct from its members, and the member representing the firm as an entity represents the firm's distinct interests in the agency relationship inherent in the attorney-client relationship.

Bond v. Blum, 317 F.3d at 399-400. Plaintiffs' argument is meritless and thus defendant Dickinson Wright, P.L.L.C. is entitled to recover its attorney's fees and costs incurred in defending this lawsuit.

8.

Plaintiffs make numerous arguments why defendant John Logie should not recover costs and attorney's fees. Plaintiffs argue that Logie cannot recover anything because he was defended by the Grand Rapids City Attorney. Plaintiffs contend that "Logie incurred no attorney fees, expenses, and costs in this matter because he used the staff of the Grand Rapids City Attorney's Office to represent him." (Objections at 10). The federal courts have flatly rejected plaintiffs' argument that attorney's fees should not be awarded on the basis that the defending attorney was a salaried government employee. "Salaried governmental lawyers, like in-house and non-profit counsel, do incur expenses if the time and resources they devote to one case are not available for other work." To deny reimbursement under these circumstances would indirectly penalize the institution, be it public or private for providing its own legal counsel throughout the case." *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363,365-66 (7th Cir. 2000); see *Bond v. Blum*, 317 F.3d at 400 (collecting cases).

Plaintiffs argue that attorney's fees should be denied because "Plaintiffs defined Defendant Logie in this lawsuit as

a partner in the law firm of Warner, Norcross & Judd L.L.P., because it was on behalf of that interest and not the City of Grand Rapids he acted as alleged in the First Amended Complaint. Therefore, the City of Grand Rapids had no obligation to represent Logie in this action and the City claims no such obligation to do so in its affidavit supporting Logie's bill of costs." (Objections at 10, docket # 139). Plaintiffs' argument cannot withstand scrutiny. Paragraph 17 of plaintiffs' First Amended Complaint alleged that defendant Logie was both Mayor of Grand Rapids and a partner in the law firm of Warner, Norcross & Judd. (docket # 13, ¶ 17). Throughout their Amended Complaint, plaintiffs objected to Logie's purported actions taken as Mayor of the City of Grand Rapids. (Id., ¶¶ 31, 93-95). Plaintiffs are not entitled to dictate, with hindsight, who should have defended Mayor Logie in this lawsuit. The City of Grand Rapids did not act gratuitously in providing a defense to Mayor Logie.

Finally, plaintiffs object to the $150 hourly rate set forth in the affidavit of Assistant City Attorney Catherine M. Mish. Plaintiffs contend that the $150 rate for Attorney Mish's time is unreasonable. Plaintiffs have not identified any inaccuracy in Ms. Mish's statement of her legal experience. The rate charged by attorneys of comparable experience employed within the private sector in this area would certainly exceed $150 per hour. The federal courts have repeatedly rejected plaintiffs' argument that the lodestar method of calculation should not apply to salaried government lawyers. *See, e.g., Carter v. State of Rhode Island*, 25 F. Supp.2d 24 (D. R.I. 1998). The 53 hours Attorney Mish spent in the process of defending her client was reasonable. The court finds that defendant Logie is entitled to recover $7,950 in attorney's fees. Defendant is not entitled to recover the additional $244.58 for Westlaw charges for the reasons previously stated. Judgment will be entered in favor of defendant John H.

Logie in the amount of $7,950 against William Q. Tingley, William Q. Tingley III and The Local Area Watch, jointly and severally.

Conclusion

For the reasons set forth herein, judgment will be entered against plaintiffs William Q. Tingley III, William Q. Tingley, and The Local Area Watch, jointly and severally, in favor of the following defendants in the listed amounts:

900 Monroe, L.L.C.; 940 Monroe, L.L.C.; Pioneer, Incorporated; and Thomas Beckering:	$ 4,760.00
William J. Fisher, III	$ 4,760.00
Frank Marshall and Superior Environmental Corp.	$ 8,061.10
Dykema Excavators, Inc.	$ 7,727.50
Dickinson Wright, P.L.L.C.	$ 7,854.00
Fifth Third Bancorp	$20,133.40
John H. Logie	$ 7,950.00

Date: October 2, 2003

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-cv-319

[Filed 06/13/03]

UNITED STATES OF AMERICA *ex rel.*	)
WILLIAM Q. TINGLEY, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
900 MONROE, L.L.C., et al.,	)
Defendants.	)
	)

Honorable Robert Holmes Bell

JUDGMENT AND PERMANENT INJUNCTION

In accordance with the opinion issued herewith:

IT IS ORDERED that plaintiffs' motion for Rule 11 sanctions (docket # 109) is **DENIED**.

IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiffs' complaint for failure to state a claim (docket #'s 31, 36, 40, 45, 50 and 56) are **GRANTED**.

IT IS FURTHER ORDERED that all defendants are entitled to recover attorney's fees and expenses from plaintiffs pursuant to 31 U.S.C. § 3730(d)(4), and costs pursuant to 28 U.S.C. § 1920 and Rule 54 of the Federal Rules of Civil Procedure. Any defendant seeking to recover reasonable attorney's fees, expenses, and costs incurred in defending this lawsuit shall submit an affidavit or affidavits to the court setting forth in detail the attorney's fees and expenses and explaining how the fees and expenses were reasonably incurred. Affidavits must be filed within fourteen days from the date of this judgment. Plaintiffs have fourteen days thereafter to submit any challenge to the reasonableness of the attorney's fees and expenses sought by any of the defendants.

IT IS FURTHER ORDERED that William Q. Tingley III, William Q. Tingley, and The Local Area Watch are hereby enjoined from filing any civil action against any defendant named in this lawsuit unless (1) plaintiffs have first paid all attorney's fees, expenses and costs levied against them in this action and file proof of such payments with the court, and (2) plaintiffs first file a cash bond with the court in the amount of $25,000 to cover costs, fees, and sanctions that may be levied against them in that litigation. Plaintiffs must attach a copy of this Judgment and Permanent Injunction and the accompanying Opinion to all future complaints filed in this court. Failure to comply with the requirements of this injunction shall also be sufficient grounds for the court to dismiss the complaint with prejudice and may also be grounds for contempt proceedings.

Date: June 13, 2003

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-cv-319

[Filed 06/13/03]

UNITED STATES OF AMERICA *ex rel.* WILLIAM Q. TINGLEY, et al., Plaintiffs,	)
v.	)
900 MONROE, L.L.C., et al., Defendants.	)

Honorable Robert Holmes Bell

OPINION

Plaintiffs William Q. Tingley III and William Q. Tingley filed this lawsuit on May 8, 2002, purporting to bring a *pro se qui tam*[1] action under the False Claim Act, 31 U.S.C.

[1] "'*Qui tam*' is an abbreviation for the Latin phrase '*qui tam* pro domino rege quam pro si ipso in hacparte sequitur,' meaning 'Who sues on behalf of the King as well as himself.'" *United States v.*

§ 3729, on behalf of the government of the United States. Although neither Tingley III or Tingley are licensed attorneys, they filed the complaint on behalf of a corporation, The Local Area Watch, a corporation the Tingleys "organized" in September 2000 and incorporated in February 2001. (Complaint, ¶ 6). This lawsuit is yet another in a lengthy series of unsuccessful lawsuits by plaintiffs[2] and corporations they control against judges, attorneys, corporations, individuals and municipal government related to the development of a parcel of real estate located in Grand Rapids, Michigan, known as the Berkey & Gay property. The history of prior lawsuits is examined in detail in the court's lengthy opinion dismissing the companion case of *William Q. Tingle, III, et al. v. City of Grand Rapids, et al.*, 1:02-cv-673 (W.D. Mich.), which is incorporated herein by reference.

On June 28, 2002, prior to a responsive pleading by defendant, plaintiffs filed a 130-paragraph first amended complaint. (docket # 13). In the amended complaint, The Local Area Watch, the corporation in whose name the Tingleys had initiated this lawsuit, was no longer listed as a plaintiff in the caption of the complaint. However, The Local Area Watch was still mentioned in the complaint, although

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Horizon Healthcare Corp., 160 F.3d 326, 329 n.1 (6th Cir. 1998)(quoting BLACK'S LAW DICTIONARY 1251 (6th ed. 1990)).

[2] In this opinion, the court deliberately uses the term "plaintiffs" rather than "relators" because, as is shown in greater detail below, this lawsuit involves only the Tingleys' ongoing private dispute with defendants, and not any legitimate interest of the United States government. The term "plaintiffs" more accurately describes the roles of William Q. Tingley III, William Q. Tingley, and The Local Area Watch in this lawsuit.

references to its corporate status had been deleted. (docket # 13, ¶¶ 7, 94). The Local Area Watch remains a party to this lawsuit because it never voluntarily dismissed its claims pursuant to the procedures set forth in Rule 41 (a)(1), nor did it obtain an order from the court dismissing it from this lawsuit. FED. R. CIV. P. 41 (a)(2). Plaintiffs' first amended complaint asserts the following claims: (1) CERCLA violations; (2) Solid Waste Disposal Act Violations; (3) False Claims Act violations; (4) and False Claims Act conspiracy stemming from the development of the Berkey & Gay property. The amended complaint names a dozen defendants, most of whom plaintiffs have previously sued without success in state court: 900 Monroe L.L.C.; 940 Monroe L.L.C.; Pioneer Incorporated; Dykema Excavators, Inc.; Fifth Third Bancorp; Superior Environmental Corp.; Prein & Newhof, Inc.; Dickinson Wright P.L.L.C.; Frank D. Marshall; William J. Fischer III; John H. Logie; and Thomas Beckering.

The matter is before the court on defendants' motions to dismiss. (docket #'s 31, 36, 40, 45, 50 and 56). Also before the court is plaintiffs's motion for Rule 11 sanctions against defendants 900 Monroe, 940 Monroe, Pioneer Incorporated, William J. Fischer III, and Thomas Beckering. (docket # 109). Upon review, plaintiffs' motion will be denied. Defendants' motions will be granted. Furthermore, defendants will be awarded their reasonable attorney's fees and costs incurred in defending this lawsuit. A permanent injunction will issue against plaintiffs as a deterrent against future abusive lawsuits by plaintiffs against defendants.

Discussion

I. Plaintiffs' Motion For Rule 11 Sanctions

Plaintiffs ask the court to impose Rule 11 sanctions against defendants 900 Monroe, 940 Monroe, Pioneer Incorporated, William J. Fischer III, and Thomas Beckering. Plaintiffs object to the second paragraph on page three of a February 14, 2003 "Memorandum Regarding Rule 16 Conference" signed by attorney Dickinson on behalf of these defendants. (docket # 96). Defendants' memorandum was in response to the court's February 10, 2003 order (docket # 94), which had provided the parties with a deadline by which to file responses to an oral request for a Rule 16 conference made by plaintiffs at a February 4, 2003 hearing. The defendants' memorandum argued that conducting a Rule 16 conference in this case would be a needless waste of time and resources. The challenged statement, placed in context, is highlighted in the paragraphs set forth below:

> [D]efendants want to respond to relators' suggestion that a stay of proceedings entered in this case or the stay previously entered in *Tingley v. Grand Rapids* should be lifted or modified to permit the filing of a motion for preliminary injunction, to enjoin what relators characterize as an "ongoing danger to public health."
>
> First, the activities that relators allege resulted in illegal disposal of contaminated soil at the former Water Filtration Plant occurred in connection with renovation and construction work performed at the former Berkey & Gay building, now a multi-use development with tenants including the Waterworks Pub and Boardwalk Apartments, located at 940

Monroe. The renovation and construction work at that site was essentially complete by Spring 2001, when new tenants began occupying the renovated property. The activities of which relators complain took place approximately 2 years ago, or longer, as the bulk of the excavation work occurred in the year 2000. Relators have not alleged that any significant event since then has created any new threat to public health.

Second, in the intervening time since those activities took place, relators have told their story to the Michigan Department of Environmental Quality (MDEQ), the Michigan Attorney General, the U.S. EPA, and the U.S. Department of Justice. Relator's presentation has included photographs and videotapes of the alleged illegal disposal activities. No governmental enforcement actions have been taken against any of the defendants in response to relator's charges. The MDEQ completed its investigation of relators' allegations and found them to be unsubstantiated, according to statements made by MDEQ representatives to the Grand Rapids Press, reported in the paper on March 6,2001 (page A 13). However, rather than dispelling relator's misconceptions, the MDEQ's actions simply served to persuade relators that MDEQ was part of the elaborate environmental crime conspiracy they refer to as "the Enterprise." Presumably, relators contend that the other governmental agencies to which they have presented their case are either corrupt co-conspirators, also, or else grossly negligent in discharging their official duties. Defendants contend that a different conclusion should be drawn from the lack of any governmental enforcement action in response to relators' claims, namely that relators failed to

> persuade these governmental agencies that their allegations had merit.

(docket # 96 at 3-4). Defendants pointed out that plaintiffs failed to produce in any court an affidavit signed by a qualified environmental professional in support of their allegations. Defendants argued that the plaintiffs are certainly not indigent, and could afford environmental experts and legal counsel. Specifically, defendants cited Tingley III's February 2003 appearance before Kent County Circuit Judge James Redford during which Tingley III argued that his father' s company, Proto-Cam, Inc., should be accepted as a surety on an appeal bond to stay the execution of judgments assessing the aforementioned monetary sanctions. Tingley III apparently represented to the state court that Proto-Cam had "over $900,000 in assets." (*Id.* at 4-5).

Plaintiffs' motion for Rule 11 sanctions is utterly frivolous. Plaintiffs do not and cannot contest defendants' statement that no governmental entity has ever taken any environmental enforcement action against defendants related to the development of the Berkey & Gay property. Plaintiffs' motion for Rule 11 sanctions is directly undermined by plaintiffs' own exhibits. For example, Exhibit B is a report from the Michigan Department of Environmental Quality. (docket # 109, Ex. B). The report provides a detailed explanation of the investigation the state government conducted in response to the Tingleys' complaints. Scientific test results showed that the soil in question met all applicable residential criteria. The MDEQ investigation concluded that the allegations made by "Mr. Tingley Sr. and Mr. Tingley III that contaminated soil had been removed from the Berkey and Gay building site and taken to both the North Monroe Filtration Plant and to Pettis Avenue Gravel" appeared

"unfounded" in light of scientific testing of soil samples. (Ex. B at 7-8).

Undeterred, the plaintiffs now purport to take issue with an "implication" in defendants' memorandum that government agencies had determined that plaintiffs' charges were unfounded "after reviewing the photographic and videotape evidence." (Plf. Motion, ¶ 5). The MDEQ investigation report expressly mentions photographs taken by Tingley III. (Ex. B at 2). The MDEQ either had, or easily could have, obtained from public records, photographs of the excavation work. The public records in this case, the companion federal case, and presumably in state court include numerous pictures that plaintiffs have filed with the court of loaded dump trucks and earth moving equipment. (*See, e.g.*,, Ex. C at 43, 45-46, 49-51, 53, 56-58, 60-61,64-66, 69-71, 74-77, 79, 81, 83, 85, 87, 89, 91, 93, 97-104, 106-07, 109-10, 113-16, 118). Whether or not the plaintiffs also provided the MDEQ with the same or similar photographs and videotape in connection with the Tingleys' complaints is irrelevant. Plaintiffs' pictures simply cannot show that soil being moved was contaminated. Soil test results are required. In this instance, the MDEQ found that plaintiffs' allegations concerning environmental contamination were "unfounded" because the Tingleys' allegations were refuted by scientific test results. Plaintiffs' motion for Rule 11 sanctions against defendants will be denied.

II. Defendants' Motions to Dismiss

A. Plaintiffs Lack Authority to Bring a *Qui Tam* Action on Behalf of the United States.

Plaintiffs purport to bring this lawsuit on behalf of the United States. Even if it had not been raised by the parties, this court would have an independent obligation to *sua sponte* consider whether William Q. Tingley III, William Q. Tingley, or The Local Area Watch could represent the United States and its interests in this lawsuit. *See Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998). Plaintiffs Tingley and Tingley III are not licensed attorneys. They are not authorized to pursue any claim on behalf of others. 28 U.S.C. § 1654. The Tingleys cannot represent The Local Area Watch or any other corporation in federal court. *See Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225-231-32 (3d Cir. 1998) (collecting cases); see also *Heldt v. Nicholson*, No. 99-2120, 2000 WL 1176879, at * 1 (6th Cir. Aug. 10, 2000). Corporations may not appear or prosecute lawsuits *pro se*. *See Power Serve Int'l, Inc. v. Lavi*, 239 F.3d 508, 514 (2d Cir. 2001); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985); *Beard v. Veneman*, No. 02-5380, 2003 WL 1528010, at * 1 (D.C. Cir. Mar. 20, 2003). *Pro se* parties are not authorized to represent the United States in bringing a *qui tam* action. *See United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951); *United States ex rel. Schwartz v. TRW, Inc.*, 118 F. Supp.2d 991, 994 (C.D. Cal. 2000). Accordingly, plaintiffs' complaint must be dismissed for failure to state a claim upon which relief can be granted.

B. Sanctions

Plaintiffs elected to file and maintain this lawsuit in federal court under the *qui tam* provisions of the FCA after their numerous unsuccessful state-court lawsuits against these defendants and others. The United States declined to intervene in this lawsuit.

Section 3730(d)(4) states that in its discretion, the court may award prevailing defendants "reasonable attorney's fees and expenses" if "the court finds that the claims of the persons bringing the action were clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31U.S.C. § 3730(d)(4). The court finds that this lawsuit, a reformulation of plaintiffs' unsuccessful lawsuits in state courts, violated all three of the very high statutory standards set forth in § 3730(d)(4). This lawsuit was clearly frivolous, clearly vexatious and brought primarily for purposes of harassment. *See United States v. National Academy of Sciences*, No. 90-2568, 1992 WL 247587, at * 7-9 (D.D.C. Sept. 15, 1992).

The *National Academy* case cited above is particularly instructive. Like this case, the purported *qui tam* action was a "dressed up" version of plaintiff's personal grievances and nearly identical to a claim previously dismissed, *Id.* at * 5. "[S]uch an action is an abuse of the *qui tam* process." *Id.* "The *qui tam* provisions are not intended as a consolation prize for 'disappointed litigators.'" *Id.* at * 6. In National Academy, the court found that appropriate relief was imposition of monetary sanctions against plaintiff pursuant to 31 U.S.C. § 3730(d)(4). *Id.* at * 7-9. The same relief is warranted in this case. Defendants are also entitled to recover their costs as prevailing parties pursuant to 28 U.S.C. § 1920 and Rule 54 of the Federal Rules of Civil Procedure. *See*

United States ex rel. Costner, 317 F.3d 889, 891 (8th Cir. 2003) (§ 3730(d)(4) (does not displace the district court's authority to award costs to prevailing parties under Rule 54). The court will order defendants to submit affidavits setting forth in detail their reasonable attorney's fees, expenses, and costs incurred in defending this lawsuit within fourteen days from the date of this opinion and the accompanying order. Plaintiffs will have fourteen days thereafter to submit any challenge to the reasonableness of the attorney's fees, expenses, and costs sought by defendants.

Injunctive relief against plaintiffs is also appropriate under the court's inherent authority and under 31 U.S.C. § 3730(d)(4). An injunction is necessary to deter plaintiffs from filing future frivolous and vexatious lawsuits against defendants. The state courts have already imposed more than $27,000 in sanctions against plaintiffs and corporations under their control with no discernable deterrent effect. There is no evidence that the plaintiffs have ever paid these court-imposed sanctions. Monetary sanctions obviously have not deterred plaintiffs. The court therefore finds it necessary to grant injunctive relief.

It is well established that federal courts have inherent powers to impose appropriate non-monetary sanctions to deter future frivolous lawsuits and/or relitigation of the same lawsuit and frivolous and vexatious litigation. See *Cauthon v. Rogers*, 116 F.3d 1334, 1337 (10th Cir. 1997); *United States v. Circuit Court for Taylor County*, 73 F.3d 669, 670 (7th Cir. 1995); *Wrenn v. Vanderbilt Univ. Hosp.*, Nos. 94-5453, 94-5593, 1995 WL 111480, at * 3 (6th Cir. Mar. 15, 1995); *accord Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 269 (6th Cir. 1998); *Telechron, Inc. v. Intergraph Corp.*, No. 95-1039, 1996 WL 370136, at * 2 (6th Cir. July 2, 1996) ("Although imposing sanctions pursuant to inherent power

and Rule 11 are analogous, courts are not bound by the strictures of Rule 11 case law when exercising their inherent powers."). Every paper filed with the Clerk of this court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. *See In re McDonald*, 489 U.S. 180, 184 (1989). Federal district courts necessarily have "considerable discretion" in drafting orders restricting a litigious party's access to courts. *See Martin-Trigona v. Shaw*, 986 F.2d 1384, 1387 (11th Cir. 1993); *Procup v. Strickland*, 792 F.2d 1069, 1074 (11th Cir. 1986) (en banc); *United States v. Barker*, 182 F.R.D. 661, 664 (S.D. Ga. 1998); *United States v. MK-Ferguson Co.*, 99 F.3d 1538, 1548 (10th Cir. 1996); *United States v. Hughes Aircraft Co.*, Nos. 94-55620, 94-55826, at * 1 (9th Cir. Oct. 21, 1996).

Both the Supreme Court and the Sixth Circuit have reaffirmed the district court's inherent authority to take action to prevent abuse of the judicial system. *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 43-45 (1991); *Big Yank Corp. v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 313 (6th Cir. 1997); *accord First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 511 (6th Cir. 2002). A prerequisite to the exercise of such power is a finding that a litigant has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Big Yank*, 125 F.3d at 313. The concept of bad faith is an objective one. *See Coppedge v. United States*, 369 U.S. 348, 445 (1962). A claim is brought in bad faith if it is frivolous. *Id.*; see *Nabkey v. Gibson*, 923 F. Supp. 117, 122 (W.D. Mich. 1990). Objectively, plaintiffs' lawsuit was filed and continued vexatiously and in bad faith by litigants dissatisfied with the outcome of state-court lawsuits.

The court's order cannot completely foreclose a litigant from access to the court. *See Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996); *Washington v. Alaimo*, 934 F. Supp. 1395, 1400 (S.D. Ga. 1996). However, the right of access to courts is neither absolute or unconditional, and there is no right of access to the courts to prosecute an action that is frivolous and malicious. *See Tripati v. Beaman*, 878 F.2d 351,353 (10th Cir. 1989); *Roscoe v. Hansen*, No. 96-2250, 1997 WL 116992, at * 2 (10th Cir. Mar. 17, 1997). Requiring court review of any proposed filings by plaintiffs would likely result in waste of scarce judicial resources. *See Sassower v. American Bar Ass'n*, 33 F.3d 733, 736 (7th Cir. 1994). Requiring plaintiffs to pay all costs and attorney's fees imposed in this case and to post a bond before allowing plaintiffs to file another civil lawsuit in this court is an appropriate and proportionate response. *See United States v. Circuit Court for Taylor County*, 73 F.3d at 674; *Jean v. Dugan*, 29 F. Supp.2d 939 (N.D. Ind. 1998) (requiring payment of all sanctions and imposing $5,000 bond before allowing plaintiff to bring any future lawsuits).

The court is authorized to require plaintiffs to post a bond in any future lawsuit to cover potential costs, attorney's fees and other sanctions. *See Sassower v. American Bar Ass'n*, 33 F.3d at 736; *Anderson v. Steers, Sullivan, McNamara & Rogers*, 998 F.3d 495,496 (7th Cir. 1993); *Ehm v. Amtrak Bd. Of Directors*, 780 F.2d 516, 517 (5th Cir. 1986); *Hawes v. Club Ecquestre El Comandante*, 535 F.2d 140, 143 (1st Cir. 1976); *Dugan*, 29 F. Supp.2d at 941; *United States v. Barker*, 182 F.R.D. at 664; *Student Loan Mktg. Ass'n v. Hanes*, 181 F.R.D. 629, 638 (S.D. Cal. 1998); *Washington v. Alaimo*, 934 F. Supp. at 1400; *A & M Gregos, Inc. v. Robertory*, 70 F.R.D. 321 (E.D. Pa. 1976); *accord Soo Hardwoods, Inc. v. Universal Oil Prod. Co.*, 493 F. Supp. 76, 78 (W.D. Mich. 1980). The Sixth Circuit reviews such

orders under an abuse-of-discretion standard. *See Stewart v. Fleet Fin.*, No. 99-2282, 2000 WL 1176881, at * 2 (6th Cir. Aug. 10, 2000) (upholding injunction requiring plaintiff to post a $25,000 cash bond before filing any future civil lawsuit against defendants). If the bond is not posted in violation of the injunction, the lawsuit is dismissed. If posted, the bond is held by the Clerk of the Court. If the litigant conducts the litigation in accordance with law, the bond is returned at the conclusion of that case. 181 F.R.D. at 638.

The court concludes that the least severe sanction likely to deter plaintiffs[3] from filing abusive lawsuits in the future is payment of the defendants' reasonable attorney's fees and costs, and nonmonetary sanctions in the form of a permanent injunction against plaintiffs, prohibiting them from filing any civil action in this court unless plaintiffs first file with the Clerk of the Court a bond in the amount of $25,000 to cover costs, fees, and sanctions that may be levied against plaintiffs in the litigation. The injunctive relief has no punitive aspect, and serves a purely deterrent function. Further, it does not

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[3] The court gave serious consideration to extending the permanent injunction issued in this case to plaintiffs' corporations Proto-CAM Incorporated, Bend Tooling, Inc., and Tennine Corporation, particularly in light of plaintiffs' unsuccessful efforts to amend the complaint to join these three corporations as plaintiffs. (docket # 64, ¶ 3). On and before January 3, 2003, plaintiffs were certainly aware that corporations could only be represented in court by licensed attorneys. However, the court has decided to refrain from expanding the scope of the injunction in this case because, unlike the companion case (1:02-cv-673) wherein Tingley, Tingley III, and Bradley actually filed a complaint purporting to represent these three corporations, here the plaintiffs simply proposed an amendment which this court denied.

close the courthouse to plaintiffs and should not deter the maintenance of meritorious litigation, as the bond secures plaintiffs' future liability for costs, attorney's fees, and sanctions in the future litigation, which presupposes that the litigation will be unsuccessful or that plaintiffs will engage in sanctionable behavior. If plaintiffs do not bring meritless or sanctionable claims, they have nothing to fear. By the same token, defendants and the court are given real and substantial protection against the maintenance of meritless litigation in the future, as they are assured of a solvent fund for the satisfaction of costs, attorney's fees and sanctions.

Plaintiffs must attach a copy of this opinion and the court's accompanying judgment and permanent injunction to any future complaints filed in this court. Failure to comply with the terms of the court's injunction shall be sufficient grounds to dismiss his complaint with prejudice. See *Barker*, 182 F.R.D. at 665.

Conclusion

For the reasons set forth herein, plaintiffs' motion for Rule 11 sanctions (docket # 109) will be denied. Defendants' motions to dismiss (docket #'s 31, 36, 40, 45, 50 and 56) will be granted. Defendants will be awarded their reasonable attorney's fees, expenses, and costs incurred in defending this lawsuit and a permanent injunction will issue against plaintiffs.

Date: June 13, 2003

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
SPOKANE WASHINGTON
EASTERN DISTRICT OF WASHINGTON

CASE NO. CS-96-0171-WFN

[Filed March 1, 2000]

UNITED STATES OF AMERICA, ex rel,	)
CHARLES D. TRICE and	)
DAVID R. CARBAUGH,	)
Plaintiffs,	)
	)
v.	)
	)
WESTINGHOUSE HANFORD COMPANY;	)
FLUOR DANIEL HANFORD, INC.; and	)
BOEING COMPUTER SERVICES	)
RICHLAND,	)
Defendants.	)
	)

ORDER

A hearing was held in this matter on January 19, 2000. Plaintiff Charles Trice participated *pro se*; Jeffrey Sprung, Steve Berman, and Michael Kanovitz participated on behalf of Plaintiff David Carbaugh; Thomas McLane and Mark Meagher participated on behalf of Defendant Westinghouse Hanford Company [WHC]; William Symmes, John

Chierichella, and Otto Klein participated on behalf of Defendant Fluor Daniel Hartford, Inc. [FDH]; and, Marc Boman participated on behalf of Defendant Boeing Computer Services Richland [BCSR]. The Court has reviewed the file and the briefing, considered the oral arguments of counsel, and is fully informed.

Each Plaintiff filed a separate Complaint, although the Complaints are substantially similar. Mr. Trice's Complaint names WHC and BCSR as stops at the point at which Defendants presented an allegedly false claim. The process by which Defendants' submissions proceeded from the DOE to Congress, how Congress evaluated those submissions, or how Congress allocated funds to the Hanford Project are beyond the scope of this Court's inquiry. Therefore, Carbaugh's Third Amended Complaint does not present a non-justiciable political question.

VI. MOTIONS TO DISMISS PURSUANT TO RULE 12 (b)(1):

STANDING FOR *PRO SE QUI TAM* PLAINTIFFS

WHC and BCSR both argue that Trice may not pursue a *qui tam* claim *pro se* because the Government is the real party in interest. A *pro se* litigant may only represent himself. Defendants' arguments present a novel question: May a *pro se* plaintiff proceed with a *qui tam* action when the Government chooses not to intervene?

Either the Attorney General or a private person may bring a civil FCA action. 31 U.S.C. § 3730(a) and (b). A private party may bring the action "for the person and for the United States government." 31 U.S.C. § 3730(b). "The action shall be brought in the name of the government." *Id.* A private

person must file his complaint in camera and serve it upon the government. 31 U.S.C. § 3730(b) (2). It is then the Government's option to "proceed with the action, in which case the action shall be conducted by the government" or to "notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. § 3730(b) (4) (A) and (B). While a *qui tam* plaintiff has an interest in an FCA action, the government clearly has priority as a plaintiff. For example, the government is not bound by any action of the person bringing the suit, may dismiss the action not withstanding the objections of the private plaintiff, and may settle the action notwithstanding the objections of the private plaintiff. 31 U.S.C. § 3730(c).

Generally, courts view a relator as an agent for the Government in an action brought under the *qui tam* provisions of the FCA because the Government is the real party in interest. *United States ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1215 (gth Cir. 1996) (citations omitted). Additionally, the Ninth Circuit has held in great detail "that the FCA effectively assigns the government's claims to *qui tam* plaintiffs . . . who then may sue based upon an injury to the federal treasury." *United States ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994) (holding that *qui tam* plaintiffs have Article III standing). The Court adopted an assignment theory of *qui tam* actions by holding that several courts have embraced an assignment theory, federal courts routinely find fraud claims are assignable, and federal courts consistently recognize that an assignee of a fraud claim can assert the claim. *Id.* The court was unconcerned that the FCA statute does not use the term 'assignment," that the government retains the right to intervene, that the government's claim is contingent on a *qui tam* plaintiff filing suit, or that the *qui tam*

plaintiff is assigned only part of the government's claim. *Id.* "If the government declines to prosecute the alleged wrongdoer, the *qui tam* plaintiff effectively stands in the shoes of the government." *Id.* The government's right to intervene is interpreted as a conditional assignment. *Id.* In sum, the Ninth Circuit held "Congress intended to assign the government's fraud claims to individual *qui tam* plaintiffs in cases where the government itself chooses not to pursue such claims." *Id.*

Defendants argue that a non-lawyer may not represent any person or entity other than himself. See *Rowland v. California Mens Colony*, 506 U.S. 194, 201-03 (1993). This principle is true as a general matter, and is stated in the cases cited by Defendants. However, *Rowland* and the many other cases cited by Defendants focus on established rules and statutory bars prohibiting corporations, partnerships, or associations appearing in federal court through someone other than a licensed attorney. *See, e.g., In Re America West Airlines*, 40 F.3d 1058, 1059 (9th Cir. 1994); *United States v. High Country Broadcasting Co.*, 3 F.3d 1244, 1245 (9th Cir. 1993), cert. denied, 513 U.S. 826 (1994). Defendants assert that the policy arguments that support precluding *pro se* individuals from appearing on behalf of corporations also apply to *qui tam* actions. See *Jones v. Niagara Frontier Transportation Authority*, 722 F.2d 20, 22 (2nd Cir. 1983) (noting "that the conduct of litigation by a non-lawyer creates unusual burdens not only for the party he represents but as well as for his adversaries and the court").

Defendants' concerns are well-founded. *Qui tam* cases, like the instant one, frequently involve complex factual and legal issues. A licensed attorney is best equipped to present arguments surrounding these issues to the Court and opposing counsel. However, the FCA meticulously addresses the

procedure by which a *qui tam* plaintiff may bring an action. Congress easily could have inserted a provision requiring a *qui tam* plaintiff to retain counsel. Congress even could have forsaken *qui tam* plaintiff standing altogether, deciding instead that only the Attorney General can properly bring an FCA claim on behalf of the Government. Congress did neither of these. *Qui tam* plaintiffs are accorded standing under the FCA, and their participation is described in such a way that it is easily interpreted as an assignment of a fraud claim by the Government to a private plaintiff. The Court finds the analysis in *Kelly* most applicable to the instant case. *Kelly* directly addresses a *qui tam* plaintiff's standing, and holds the basis for that standing is the assignment of a fraud claim. That characterization is critical because a corporation may not assign its claim to a lay person proceeding *pro se*. *Jones*, 722 F.2d at 23. Also, case law and statutes prohibit a corporation's claims from being pursued by a *pro se* individual. No such bar exists for the Government's claims. The analysis in *Kelly* is more appropriate to the instant case than Defendants' analogy to rules regarding representation of corporations.

Defendants also cite an Eighth Circuit Court of Appeals decision from 1951:

> [W]e do not think that Congress could have intended to authorize a layman to carry on [an FCA] suit as attorney for the United States, but must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that one licensed to practice law may conduct proceedings in court for anyone other than himself.

United States v. Onan, 190 F.2d 1, 6 (8th Cir.), cert. denied, 342 U.S. 869 (1951). This holding was based on the old

FCA, 31 U.S.C. § 232. The FCA subsequently has been amended five times. Also, this decision was rendered far before the Ninth Circuit finding that an FCA claim is an assignable fraud claim. Citing *Onan*, another court held as dicta that a *qui tam* action filed by a *pro se* litigant should be dismissed unless an attorney is retained. *Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2nd Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). This dicta is not binding on this Court.

Assignment of a claim places the assignee in the shoes of the assignor. Essentially, the claim becomes the assignee's claim. An assignee may litigate his own claim if he wishes. In light of the Ninth Circuit's view that FCA claims are fraud claims assigned by the Government to the private litigant when the Government declines to intervene, Trice is allowed to proceed *pro se*.

VII. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6):

STATUE OF LIMITATIONS

WHC also filed a Motion to Dismiss Claims in Count I of Carbaugh's Third Amended Complaint Predating March 19, 1999 as prohibited by the statue of limitations.

The FCA establishes time limitations within which an action must be brought. A civil FCA action may not be brought:

> (1) More than 6 years after the date on which the violation of § 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of the action are known or

> reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b) (1) and (2). The Ninth Circuit has held that the tolling provision applicable to an "official of the United States charged...

* * * *

14. Defendant BCSR's Motion to Dismiss Plaintiff Trice's Retaliation Claim Under 31 U.S.C. § 3730(h), **Ct. Rec. 160**, is **GRANTED**. Count 2 of Plaintiff Trice's Second Amended Complaint is **DISMISSED WITHOUT PREJUDICE AS TO DEFENDANT BCSR.**

The District Court Executive is directed to file this Order and provide copies to counsel **AND TO** *pro se* Plaintiff Trice.

DATED this 1 day of March, 2000.

/s/_____
WM. FREMMING NIELSEN
CHIEF UNITED STATES
DISTRICT JUDGE